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In the Supreme Court of the United States

OCTOBER TERM, 1980

W. C. YORK, PETITIONER

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Federal Home Loan Bank Board approving the application of First Federal Savings and Loan Association of Raleigh, a federally-chartered mutual association, to alter the form of its business organization to that of a stock association, was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

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* Additional respondents are Federal Savings And Loan Insurance Corporation and intervenor First Federal Savings And Loan Association of Raleigh.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 624 F.2d 495.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1980. The petition for a writ of certiorari was filed on September 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Federal Home Loan Bank Board is the federal agency responsible for the chartering, organization, supervision and regulation of federal savings and loan associations. Section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(a). Respondent Federal Savings and Loan Insurance Corporation (FSLIC) operates under the direction and control of the Board. 12 U.S.C. 1437(b), 1725 (a), and (c), and 1730(k)(1). FSLIC insures the accounts of all federal associations, as well as eligible state associations, and regulates insured institutions under Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.* The Board and FSLIC are responsible, *inter alia*, for approving and regulating conversions of federal, and state-chartered FSLIC-insured, mutual saving and loan associations to federal or state-chartered stock associations. See 12 U.S.C. 1464(i), 1725(j); 12 C.F.R. Part 563b; Pet. App. 3a-6a.

2. By resolution No. 79-298, dated May 17, 1979, the Board approved the application of respondent

First Federal Savings and Loan Association of Raleigh (First Federal) to convert from a federal mutual savings and loan association to a federal stock savings and loan association, pursuant to a sale-of-stock conversion plan that was authorized by First Federal's charter (Pet. App. 2a) and satisfied the Board's conversion regulations (12 C.F.R. Part 563b).[1] On June 29, 1979, the members of First Federal overwhelmingly approved the conversion plan; 71.6% of the total outstanding votes were cast in favor of the plan, while only 5.9% were cast against it (Pet. App. 2a).

Petitioner, a depositor-member of the association, thereafter petitioned for review in the court of appeals. Principally, petitioner claimed that the conversion was illegal because the Board's statutory approval authority (Section 402(j) of the National Housing Act, 12 U.S.C. 1725(j)) had expired. Alternatively, he claimed that the Board's approval of the conversion was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The court of appeals rejected both claims (Pet. App. 1a-

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[1] A sale-of-stock conversion is one in which the converting association sells its capital stock at the estimated pro forma market value, with eligible depositors of the association having priority rights to subscribe for the purchase of the conversion stock issue. Since 1974, the Board has approved 90 such conversions, 59 of which have now been completed. The converting associations have thereby raised approximately $276.6 million in net capital (gross sales less expenses); these funds have enabled the converting associations to provide additional funds for home financing. As the Fourth Circuit noted, Congress confirmed the Board's statutory authority to approve such conversions in Pub. L. No. 93-495, 88 Stat. 1504, 12 U.S.C. 1725(j); that authority has not been revoked (Pet. App. 4a-7a).

9a). Petitioner challenges the judgment below only with respect to the court's rejection of his alternative claim.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner's contention (Pet. 5-17) that the Board's approval of First Federal's conversion application violated his rights is insubstantial. The conversion was approved by majority vote of the association's members pursuant to established procedures, and the conversion also met the substantive and procedural requirements specified in the Board's regulations. While petitioner may disagree with the decisions made by his co-members and the action taken by the Board, he has no legal ground for complaint. The rights of an association member are limited by law and contract, and they are subject to alteration: "Holders of savings accounts and obligors of an association shall, *to such extent as may be provided by its charter or by regulations of the Board,* be members of the association, and *shall have such voting rights and such other rights as are thereby provided.*" 12 U.S.C. 1464(b)(1) (emphasis added).[2] The charters of all federal mutual associa-

[2] Federally-chartered mutual savings and loan associations, because of their federal charters and the fact that they are creatures of federal law, are simply unlike other mutual associations such as insurance companies. The courts have consistently held that the Board's regulations govern the operations of every federal savings and loan association from organization to dissolution. See, *e.g.*, *Meyers* v. *Beverly Hills Federal Savings & Loan Association*, 499 F.2d 1145,

tions, including First Federal, provide that the charter may be amended; that the association is subject to federal law, rules and regulations; and that the association has the power, subject to Board approval, to convert to the stock association form. See 12 C.F.R. 544.1. In no sense, therefore, was there any unlawful "taking" when First Federal lawfully amended its charter and converted to a stock association in accordance with applicable federal regulations and with the overwhelming approval of its members.

Petitioner's contrary contention is based upon the incorrect assumption that association member-depositors have an "ownership interest" in the association equivalent to that of a shareholder in a typical corporation. In fact, the members of a federally chartered "deposit" [3] association are more similar to creditors

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1146 (9th Cir. 1974); *Kupiec* v. *Republic Federal Savings and Loan Association*, 512 F.2d 147, 150 (7th Cir. 1975). While principles of corporate law may be used as a model to develop federal common law to the extent that the Board has not specifically established the rights of association members (*Murphy* v. *Colonial Federal Savings and Loan Association*, 388 F.2d 609, 611 (2d Cir. 1967)), the Board has unquestioned authority to establish the rights of association members along different lines. 12 U.S.C. 1464(b)(1); *Kupiec* v. *Republic Federal Savings and Loan Association, supra*, 512 F.2d at 153-154.

[3] First Federal was a "deposit" association prior to conversion. Unlike the depositors of a "share" association, the depositors of a "deposit" association have no legal right to share in the profits of the association; they are entitled only to a contractually-fixed rate of return. In a "deposit" association, however, the depositors share at dissolution on an equal footing with all other creditors; the claims of depositors in a "share" association may be satisfied only after the claims of other creditors have been satisfied. The cases upon which

in that they receive a fixed, contractual rate of interest on their deposit accounts; they have no right to share in the profits or net worth of the association except in the unlikely event that the Board approves the liquidation of a solvent association. See 12 C.F.R. 545.1-2. See generally *Mengele* v. *Christiana Federal Savings and Loan Association*, 287 A.2d 395, 397 (Del. 1972); *In re Estate of Morey*, 38 Ill. 2d 575, 579, 232 N.E. 2d 734, 737 (1967); *Benton's Apparel, Inc* v. *Hegna*, 213 Minn. 271, 275-276, 7 N.W. 2d 3, 5-6 (1942); *Aberdeen Saving & Loan Ass'n* v. *Chase*, 157 Wash. 351, 369-370, 289 P. 536, 544 (1930).

2. Petitioner also contends (Pet. 16) that the conversion resulted in the unlawful "taking" of his "voting rights." Again, petitioner's contention lacks merit because, by definition, his voting rights were limited by law and contract. Because those rights were held subject to the possibility that they could be extinguished in certain circumstances, petitioner cannot complain that they were thus extinguished. The voting rights of association members are narrowly circumscribed: federal charters uniformly limit the maximum number of votes that a depositor may cast, regardless of the amount of his deposit account. See 12 C.F.R. 544.1(a)(4), 544.1(b)(4), 544.2(e). Voting rights are further limited in that the association's board of directors may generally approve or disapprove mergers without the consent of the mem-

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petitioner relies (Pet. 11-14) are inapposite in that they involved the rights of depositors in "share" associations. Likewise, petitioner incorrectly asserts (Pet. 12) that the FSLIC took a position in *Lanigan* v. *Apollo Savings*, 40 Ill. App. 3d 927, 353 N.E. 2d 239 (1976), that is inconsistent with its position here. *Lanigan* involved a state-chartered, FSLIC-insured "share" association, rather than a federally-chartered "deposit" association as is involved in this case.

bers. 12 C.F.R. 546.2(e). Likewise, the board of directors may redeem a depositor's account, thereby terminating his membership and extinguishing his voting rights. See 12 C.F.R. 544.1(a)(7), 544.1(b)(7). At all events, the conversion here, which was approved pursuant to the association's charter and federal regulations by an overwhelming majority of the outstanding votes, did not improperly abridge petitioner's rights.

3. Finally, petitioner contends (Pet. 16) that the conversion unlawfully eliminated his right to share in future earnings and surplus upon dissolution. That contention is insubstantial. As we have previously noted (pages 4-5 & n.3, *supra*), association members have no right to share in the earnings of a "deposit" association. Indeed, this Court has previously observed that a member's contingent interest in the assets of the association in the event of liquidation is largely ephemeral and without value. See *Society for Savings* v. *Bowers*, 349 U.S. 143, 150 (1955). Moreover, the terms of the conversion here fully provided for the protection of whatever interests depositors might have in the net worth of the association upon liquidation, by requiring the establishment of a special liquidation account equal to the amount of the association's net worth at the time of conversion. 12 C.F.R. 563b.3(c)(12), 563b.3(f).[4]

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[4] The function of the liquidation account is to establish a priority on liquidation for the benefit of mutual accountholders who retain their savings accounts in the converted association. Each eligible accountholder has a related inchoate interest in a portion of the liquidation account balance in an amount proportional to his qualifying deposits. In the unlikely event that the converted institution is subsequently liquidated, each eligible accountholder would be entitled to receive a liquidation distribution in the amount of his cur-

First Federal's conversion plan and the Board's conversion regulations thus provide full protection for the depositors' legitimate interests. Depositors receive a savings account in the converted stock association for the same amount, term and interest rate as their account in the former mutual association. 12 C.F.R. 563b.3(c)(11). They also have the first opportunity to purchase the new stock. 12 C.F.R. 563b.3(c)(2)-(5). Moreover, the change in form of organization, with its attendant change in voting rights, occurs only after the conversion plan has been approved by a majority of the votes. 12 C.F.R. 563b.6. Finally, this vote occurs only after all accountholders have received a detailed proxy statement fully describing all relevant aspects of the proposed conversion, including the change in their voting rights. 12 C.F.R. 563b.8 and 9.

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rent adjusted related interest in the liquidation account balance, before any assets could be distributed to the shareholders. The depositor's right to share in a distribution of the net worth of the association upon liquidation is thus enhanced, rather than diminished, by conversion because of the additional conversion-raised capital that is available to satisfy the liquidation rights of eligible accountholders. See 12 C.F.R. 563b.3(c)(12) and 563b.3(f).

Petitioner asserts (Pet. 16) that this special liquidation account does not adequately protect the rights of accountholders because it will not continue to grow in the same manner as the net worth of the prior mutual association. If an accountholder really wishes to continue to preserve whatever right he has to share in a growing net worth, however, he is free to transfer his funds to a mutual association.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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